UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/782
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 782

Case No. 857: ZOUBREV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, at the request of Vladimir Zoubrev, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 15 January, 15 April, 31 July 1993 and, following a remand of the case to the Joint Review Group, to 3 and 30 April 1995, the time-limit for the filing of an application with the Tribunal;

Whereas, on 28 April 1995, the Applicant filed an application requesting the Tribunal:

"(a) To rescind the decision of the Secretary-General dated September 28, 1994 maintaining his previous decision of November 21, 1991, itself confirming his previous decision of March 28, 1991;

(b) To order the Applicant's immediate reinstatement and the payment of full salary and applicable allowances and benefits from the date of his separation from service (April 30, 1991) to the date of reinstatement;

...

(g) To award the Applicant additional compensation to be determined by the Tribunal for the unwarranted suffering and professional and moral damages caused to the

Applicant by the Respondent's actions and failure to enforce the Applicant's terms of appointment;

(h) To fix, under Article 9, paragraph 1 of its Statute and Rules, the amount of compensation to be paid in lieu of specific performance at forty months of net base pay in view of the special circumstances of the Applicant's case."

Whereas the Respondent filed his answer on 22 January 1996;

Whereas the Applicant filed written observations on 20 February 1996;

Whereas the facts in this case are as follows:

The Applicant entered the service of the Organization on 17 September 1986, after having attended the UN Language Training course in Moscow, on a one-year fixed-term appointment as a Translator, at the P-3, step I level, in the Russian Translation Service, Translation Division of the then Department of Conference Services (DCS) at UN Headquarters in New York. His Letter of Appointment stated that he was "on secondment from the USSR Government". With effect from 17 September 1987, the Applicant's fixed-term appointment was extended for three years. His performance evaluation report (PER) for the period 17 September 1986 to 30 June 1987 gave the Applicant an overall rating of "a good performance".

In August 1990, the Officer-in-Charge, DCS, sent to the Office of Human Resources Management (OHRM) a list of ten members of the Russian Translation Service, including the Applicant, whose contracts were due to expire in September-November 1990 and for whom no extensions were recommended; the contracts of two other members of the Service were to be extended for two weeks only. On 11 September 1990, the Under-Secretary-General, DCS, wrote to the Assistant Secretary-General, OHRM, recommending that the appointments of eight of the Russian translators mentioned in the

earlier memorandum, including the Applicant, be extended through the end of the General Assembly session.

On 2 November 1990, the Applicant wrote to the Director, Translation Division, DCS, requesting a one-year extension of his contract. By a letter dated 28 March 1991, from the Director, Staff Administration and Training Division (SATD), OHRM, the Applicant was informed that his request had been denied and that he would be separated from the Organization on 30 April 1991.

On 25 May 1990, the Administrative Tribunal rendered its Judgement No. 482, Qiu, Zhou and Yao (1990). In the light thereof, on 20 December 1990, the Administration constituted a Joint DCS/OHRM Group (hereinafter referred to as the JRG) to review both those language staff members whose contracts were about to expire and who were previously considered to be on secondment, as well as those appealing a decision not to renew their appointments. The JRG set out criteria for examining each current and former staff member for a further appointment.

The Applicant's PER for the period 1 July 1987 to 31 December 1990, indicated that he received six "C"s, six "B"s and two "A"s and the overall rating of a "good performance". The PER was signed by the Chief of the Russian Translation Service, as the First Reporting Officer, on 16 January 1991; the signatures of the Second and Third Reporting Officers appear to be those of the Director/DCS. The PER rated the quantity of work produced (Item 3) as "B" (very good). The Applicant signed the PER on 4 February 1991.

On 28 March 1991, the Director, SATD, OHRM, informed the Applicant that she had accepted the recommendation of the JRG with regard to the Applicant's case and that the Applicant would be separated from the Organization on 30 April 1991. She attached the relevant part of the JRG report, which noted that the most recent PER had been read out at the JRG meeting and that the "Chief of Service stated that in all aspects his [the Applicant's] productivity was low when compared to other staff for the years 1989

to 1990". The JRG report concluded, "Final recommendation was made not to extend Mr. Zoubrev's fixed-term appointment". The Applicant submitted a rebuttal to his PER on 13 May 1991 and, on 30 April 1991, he separated from service.

The Rebuttal Panel's report, dated 23 July 1991, recommended that one item of the Applicant's contested PER be upgraded from "C" to "B", one item be deemed "not applicable", and the Applicant's overall rating be upgraded to "a very good performance". The Rebuttal Panel stated that the "administrative irregularities in the preparation of this performance evaluation report can do nothing but raise questions regarding the accuracy of the ratings it contains". In order for the overall rating to reflect the individual ratings, the Panel re-assessed the individual ratings and concluded that "no matter what decision is taken concerning the recommendation of the Panel regarding items 1 and 11, the overall rating should be '2' (a very good performance), not '3' (a good performance)".

However, in her appraisal of the Rebuttal Panel report dated 7 August 1991, the Officer-in-Charge of DCS, who was also the Second Reporting Officer, decided not to change any of the Applicant's ratings.

On 10 September 1991, the Applicant requested the Secretary-General to review the foregoing administrative decision. On 2 October 1991, the Director, SATD, OHRM, informed the Applicant that the JRG would again consider his case.

On 5 November 1991, the Applicant lodged an appeal with the JAB against the decision relating to his PER.

On 20 November 1991, the Director, SATD, OHRM, informed the Applicant that, in the light of the recommendation of the JRG, the Secretary-General had decided to maintain his decision not to extend the Applicant's appointment. On 16 December 1991, the Applicant lodged an appeal with the JAB against this decision.

The JAB adopted its report on 8 June 1992. Its consideration and recommendation read as follows:

"...

17. The Rebuttal Panel's first conclusion touched on 'administrative irregularities in the preparation' of the PER [performance evaluation report]. ... On internal evidence, the Panel was convinced that the Rebuttal Panel had done its work thoroughly and conscientiously, and had no reason to question the validity of its recommendations, specifically that

- The rating for 'Competence' be raised to 'B';

- The rating for 'Ability to negotiate and persuade' be 'not applicable', and

- The overall rating be raised to 'a very good performance'.

...

... The Panel recalls in this connection [i.e., the evaluation of the Applicant's performance] UNAT Judgement No. 363 (De Franchis), which reads:

> '... In that context, any steps of the Administration that could lead to an assessment of a staff member's performance that would be reasonably open to challenge may constitute a breach of the staff member's right to have his performance assessed in an absolutely impartial way.'

In the absence of an explanation of the appraisal by [the Officer-in-Charge, DCS] - or by the Respondent, for that matter - the Panel considered that the assessment of Appellant's performance is 'reasonably open to challenge'.

19. The Panel then turned its attention to the review proceedings established 'with respect to staff members originally thought to be on secondment.' ... The peculiar situation of the Chinese and Russian staff both prior to and after UNAT Judgement No. 482 and the admitted need of the Administration to establish special transitional measures demonstrated the fallacy of that statement. It was, therefore, incumbent upon the administration to devise measures that, if not precisely like those applied to other staff members, would - at a minimum - guarantee the same procedural safeguards. This, the Administration failed to do.

> ... It [the Panel] could not accept that the legal obligation of the Organization to an individual to whom it may have made an offer of appointment is on a par with the obligation of the Organization under the terms of staff regulation 4.4 to a serving staff member. ...
>
> ... The factors to be taken into account by the Joint Review Group ... were '(i) favourable record of performance; (ii) need for continued services ...; (iii) availability of post.' There was no question as to the second and third factors; however, the Panel could not find a definition in the Criteria or by the Joint Review Group of a 'favourable record'.
>
> 22. ... The Panel had established to its own satisfaction that Appellant's rating should have been a 'very good performance', but the Joint Review Group was given [the Officer-in-Charge, DCS]'s appraisal and a rating for Appellant of 'a good performance'. The Panel concluded that the Joint Review Group had been misinformed on a significant point. ...
>
> 23. ... The Panel has no doubt that the decision to terminate Appellant's fixed-term appointment was tainted by falsehood and a serious lack of due process.
>
> Recommendation
>
> 24. The Panel recommends, therefore, that Appellant be paid compensation in an amount equivalent to six months' net base salary."

In a letter dated 21 October 1992, the Assistant Secretary-General, OHRM, advised the Applicant as follows:

> "In view of the procedural deficiencies identified by the Board in your case, and in view of the comments made by the Administrative Tribunal in Judgement No. 559 on the procedures followed by the Joint Review Group in two other cases, the Secretary-General has decided to remand your case to a reconstituted Joint Review Group which will consider your situation anew."

In a letter dated 28 June 1993, the Officer-in-Charge, SATD, OHRM, invited the Applicant to submit his comments to the reconstituted JRG, which the Applicant did on 15 July 1993.

On 25 February 1994, the reconstituted JRG submitted its report. It concluded that there were "insufficient grounds" to reverse the decision of the original JRG not to renew the Applicant's appointment. In a letter dated 28 September 1994, the Director, SATD, OHRM, advised the Applicant as follows:

> "... I regret to inform you that, in light of the recommendation of the Joint Review Group, the Director of Personnel has decided to maintain the earlier decision regarding your case."

On 28 April 1995, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's fixed-term appointment was vitiated by prejudice and extraneous considerations. The delay and the inconsiderate silence of the Respondent in connection with the handling of the Applicant's case amounted to a serious breach of the Applicant's contractual rights.

2. The procedure of the JRG denied the Applicant due process and its recommendation was tainted by falsehood.

3. The Applicant was deprived of his right to due process in connection with his PER that covered the period from 1 July 1987 to 31 December 1990.

Whereas the Respondent's principal contention is:

The reconstituted JRG gave the Applicant every reasonable consideration for a career appointment and accorded him due process in so doing.

The Tribunal, having deliberated from 23 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals the decisions of the Secretary-General not to extend the Applicant's fixed-term appointment. He seeks reinstatement and additional compensation for moral and professional damage. In lieu of specific performance, he seeks 40 months' net base salary. The Joint Appeals Board (JAB) found that the Respondent's decision not to extend the Applicant's contract was tainted by falsehood and that the Applicant had been denied due process. It recommended that the Applicant be paid six months' net base salary as compensation. The Secretary-General remanded the Applicant's case to a reconstituted Joint Review Group (JRG). The reconstituted JRG upheld the finding of the original JRG, not to renew the Applicant's appointment. The Secretary-General accepted this finding and the Applicant appeals this decision to the Tribunal.

II. The Applicant questions the procedure adopted by the JRG which, he says, did not provide for proper consideration of his case. He also claims that he was deprived of his right to due process in connection with his performance evaluation report (PER) covering the period 1 July 1987 to 31 December 1990. Pending the review resulting from the Tribunal Judgement No. 482, Qiu, Zhou and Yao (1990), the Applicant's appointment was extended to 31 March 1991.

III. The Applicant's PER for the period 1 July 1987 to 31 December 1990, giving an overall rating of a "good performance", was signed by the Chief, Russian Translation Section, on 16 January 1991. The PER was also apparently signed, on 21 January 1991, by the Officer-in-Charge, Department of Conference Services (DCS). The rating for item 3, Quantity of work accomplished was "B" (very good). The Applicant was informed that, on the recommendation of the JRG, the Respondent had decided not to offer him a further appointment and that he was to be separated from service on 30 April 1991. An

extract from the JRG's report accompanied this notification. It disclosed that the most recent PER had been read out and that the Chief of Service had stated that, in all aspects, the Applicant's productivity had been low when compared with that of other staff members for the years 1989 to 1990.

IV. Subsequent to his separation on 30 April, the Applicant, on 13 May 1991, submitted a rebuttal to the PER. The Rebuttal Panel recommended, in its report of 23 July 1991, that one item be upgraded from "C" to "B", that one item be deemed "not applicable" and that the overall rating be upgraded to "a very good performance". In making this recommendation, the Panel stated that it believed that, in order to allay suspicion that extraneous considerations were a factor in the preparation of any PER, the overall rating must reflect the individual ratings. The Officer-in-Charge, DCS, on 7 August 1991, said that, having considered the recommendations of the Panel, she decided that all ratings should remain unchanged.

V. In response to the Applicant's request for an administrative review of this decision, the Director, Staff Administration and Training Division (SATD), Office of Human Resources Management (OHRM), informed the Applicant that the JRG would again consider his case. On 6 November 1991, the Applicant filed his appeal against the decision relating to his PER. On 20 November 1991, the Director, SATD, OHRM, informed the Applicant that, in the light of the JRG's recommendation, the Secretary-General had decided to maintain his decision not to extend the Applicant's appointment. The letter enclosed a portion of the JRG's report, which concluded: "Final recommendation: Given the totality of the circumstances, including relative performances, particularly the ratings of individual items and the needs of the service, it was not possible

to make a recommendation in favour of [the Applicant]". The staff representative placed on record reservations regarding the final recommendation.

VI. The Respondent's decision not to offer the Applicant a further appointment and that he be separated from service as of 30 April 1991 followed a recommendation of the JAB. This recommendation was based on considerations in which the PER clearly played a significant part. Yet, this was a PER which the Applicant had not rebutted at the time of the JRG's review. In the Tribunal's view, the JRG should not have had to base its consideration on an unchallenged presentation of the Applicant's performance but should have had the outcome of the Applicant's rebuttal before it.

The importance of this point is highlighted by the findings of the Rebuttal Panel, which upgraded the Applicant's overall rating to "a very good performance", leaving open the possibility, at least, that the JRG's recommendation would have been different if it had been in possession of the amended PER.

VII. The Applicant also takes issue with the decision of the Officer-in-Charge, DCS, that all ratings should remain unchanged. The Respondent argues that no specific format for appraisal is required in examining the Applicant's ratings, nor must reasons be given. As appraising performance after rebuttal is an administrative process and not a judicial proceeding, the Respondent contends that there was no reason for the Officer-in-Charge to have disqualified herself. The Respondent also contends that the usual format used by the Department was followed in carrying out the appraisal.

In the Tribunal's view, it is clearly undesirable that the Officer-in-Charge, who had initially participated in the assessment of the Applicant's performance in the original PER, should subsequently adjudicate on the conclusions of the Rebuttal Panel.

Indeed, there is a clear conflict of interest in the Officer-in-Charge, DCS, being involved in both aspects of this process, and she should not have carried out the appraisal. Because of the far-reaching consequences of her decision, the Officer-in-Charge was involved in something far more important than an administrative process. It is unacceptable that, in a matter of such consequence, and, particularly in view of her involvement in the initial part of the process, the Officer-in-Charge should have issued her finding on the Rebuttal Panel's conclusions without giving any explanation for such finding.

VIII. The reconstituted JRG took into account the totality of the circumstances, which included relative performance. The JRG took into account the claims of competing candidates and reviewed the staffing situation. There were two vacant P-3 posts in existence at the time of the Applicant's separation. One post was used for the re-assignment of another P-3 level staff member, who had been held against a P-4 level recruit who had accepted an offer of employment made previously. The other post was filled by another staff member who had been reinstated as a result of an earlier review on the basis of what the JRG describes as his excellent performance. However, the JRG's assessment of the Applicant's performance was based on flawed procedures and so its recommendation must, of necessity, be questioned.

While the question of the Applicant's performance permeated the report of the JRG and played an important part in its considerations, it is not possible to determine that the JRG's findings would have been different if the performance of the Applicant had been fully and accurately presented to it.

It is, however, beyond argument that, because the procedure was flawed from the outset right through to the final recommendation of the JRG, the Applicant was deprived of due process. The Applicant is, therefore, entitled to compensation.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant 15 months' net base salary at the rate in effect as of the date of his separation.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary